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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91178927
Party	Defendant The Coca-Cola Company
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Attachments	TCCC Memorandum in Support.pdf ( 8 pages )(256353 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MATT EHRLICH and SHLOMO	)	
FRIED, and/or MAYIM TOVIM,	)	
	)	
Opposers,	)	OPPOSITION
	)	
v.	)	NO. 91177358
	)	
THE COCA-COLA COMPANY,	)	
	)	
Applicant.	)	
	)	
ROYAL CROWN COMPANY, INC.,	)	
	)	
Opposer,	)	OPPOSITION
	)	
v.	)	NO. 91178927
	)	
THE COCA-COLA COMPANY,	)	
	)	
Applicant.	)	
	)	
COMPANHIA DE BEBIDAS DAS	)	
AMÉRICAS - AMBEV,	)	
	)	
Opposer,	)	OPPOSITION
	)	
v.	)	NO. 91178953
	)	
THE COCA-COLA COMPANY,	)	
	)	
Applicant.	)	

MEMORANDUM IN SUPPORT OF  
MOTION TO CONSOLIDATE PROCEEDINGS

NOW COMES THE COCA-COLA COMPANY (“TCCC” or “Applicant”), the applicant in each of the above-captioned matters, and, by and through its undersigned counsel and in accordance with Rule 2.127(a) of the Trademark Rules of Practice, 37 C.F.R. § 2.127(a), hereby files this memorandum in support of TCCC’s Motion To Consolidate Proceedings, filed concurrently herewith.

### INTRODUCTION

Through its Motion To Consolidate, TCCC seeks to consolidate into a single proceeding Opposition Numbers 91177358, 91178927 and 91178953 (the “Oppositions”), all of which are presently pending before the Board. All three oppositions relate to TCCC’s application to register the mark COCA-COLA ZERO (Serial No. 78/580,598) (the “Application”), which was published for opposition on April 17, 2007. The Oppositions have been filed by competitors of TCCC in the beverage industry who object to TCCC’s registration of COCA-COLA ZERO for beverage goods in Class 32. The Oppositions share common questions of law and of fact and will require the production of similar testimony and evidence. For this reason, the consolidation of these proceedings will promote efficiency, prevent a waste of judicial resources and will avoid unnecessary delay and costs.

## FACTUAL BACKGROUND

On March 4, 2005, TCCC filed its Application to register the mark COCA-COLA ZERO for “beverages, namely soft drinks, syrups and concentrates for the making of the same” in International Class 32. In response to the Examining Attorney’s requirement that TCCC disclaim “ZERO,” TCCC amended its application to demonstrate acquired distinctiveness of ZERO under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f). On January 25, 2007, TCCC submitted to the Examining Attorney substantial evidence in support of its claim of acquired distinctiveness, including unsolicited media articles discussing TCCC’s family of ZERO products, advertising materials for TCCC’s ZERO-branded beverage products, and advertising and sales figures to demonstrate the acquired distinctiveness of ZERO. Based on TCCC’s evidence of acquired distinctiveness, the Examining Attorney permitted the Application to proceed to publication without a disclaimer of ZERO.

On May 17, 2007, Matt Erhlich and Shlomo Fried and/or the partnership known as Mayim Tovim (the “First Opposers”) filed a Notice Of Opposition against the Application. The First Opposers have alleged a likelihood of confusion with the First Opposers’ mark ZER0 CAL (Stylized), as shown in Registration Number 3,156,317. The First Opposers’ Opposition has been assigned Opposition No. 91177358 (the “First Opposition”).

On August 14, 2007, Royal Crown Company, Inc. (“Royal Crown” or the “Second Opposer”) filed a Notice Of Opposition against the Application. The Second Opposer has alleged that ZERO is merely descriptive of TCCC’s beverage products and that TCCC committed fraud in connection with its application for COCA-COLA ZERO. The proceeding commenced by the Second Opposer has been assigned Opposition No. 91178927.

On August 15, 2007, Companhia de Bebidas das Americas - AMBEV (“AmBev” or the “Third Opposer”) filed a Notice of Opposition against the Application. Like Royal Crown, the Second Opposer AmBev has alleged that ZERO is merely descriptive of TCCC’s beverage products. The proceeding commenced by the Third Opposer has been assigned Opposition No. 91178953.

TCCC now moves pursuant to Rule 42(a) of the Federal Rules Of Civil Procedure to consolidate these three proceedings in order to avoid unnecessary delay and costs in view of the common questions of law and/or fact involved in the three Oppositions.

#### ARGUMENT AND CITATION OF AUTHORITIES

Pursuant to the Trademark Trial And Appeal Board Manual Of Procedure (“TBMP”), “when actions involving a common question of law or fact are pending before the [Board] . . . it may order all the actions consolidated; and it may make

such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” TBMP § 511; World Hockey Ass’n. v. Tudor Metal Products Corp., 185 USPQ 246 (T.T.A.B. 1975); see also Fed.R.Civ.P. 42(a). Consolidation is within the Board’s discretion, and may be ordered upon motion granted by the Board, upon stipulation of the parties or upon the Board’s initiative. TBMP § 511. In determining whether to consolidate actions, the Board should weigh the benefits in saved time, effort and expense gained from consolidating the actions against the prejudice and inconvenience that may be caused by consolidating the actions. Id.

While actions involving the same parties are likely candidates for consolidation, a common question of law or fact is a sufficient basis for consolidation. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2384 (1995); see also, Procter & Gamble Co. v. Nabisco Brands, Inc., 604 F. Supp. 1485 (D. Del. 1985); Magnavox Co. v. APF Electronics, Inc., 496 F. Supp. 29 (N.D. Ill. 1980). If an appropriate common question exists, “courts often have consolidated actions despite differences in the parties.” Id. Consolidation has been ordered where separate plaintiffs were seeking the same relief in separate actions. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2384 (1995).

The Oppositions are appropriate for consolidation, due to the shared questions of law and/or fact and the potential for duplication of evidence, testimony and arguments. The Applicant is the same in all three proceedings, and

all three Oppositions relate to the same Application. All of the opposers are competitors of TCCC in the beverage industry. In addition, Applicant's Answers to the Oppositions raise similar issues and defenses such as the acquired distinctiveness of TCCC's family of ZERO products and the validity of its Application. Royal Crown, the Second Opposer, has even acknowledged in its Motion to Suspend Proceedings, filed on October 11, 2007, that the Second Opposition and the First Opposition are similar in that they "seek the same result."

Consolidation is most appropriate because it will "avoid unnecessary costs or delay," as encouraged by Rule 42(a) of the Federal Rules. TCCC filed its application to register COCA-COLA ZERO on March 10, 2005, and vigilantly prosecuted the application for almost two years before it was published for opposition. By consolidating the Oppositions that will require similar evidence, discovery, witnesses, and arguments, the Board will promote efficiency and economy in the resolution of these proceedings, reduce paperwork and other administrative burdens, and avoid unnecessary costs and delay. TCCC's witnesses will need to be deposed only once and to give testimony only once – rather than three times. All three Opposers will be bound by the outcome, and none can claim to suffer prejudice from the consolidation as long as their rights to discovery are not adversely affected. By re-setting the schedule in the consolidated proceedings

to track the schedule in the last of the three oppositions to be filed, the rights to discovery of all three opposers would be fully preserved.

CONCLUSION

WHEREFORE, for the foregoing reasons, Applicant The Coca-Cola Company respectfully prays for entry of an order consolidating the proceedings in Opposition Numbers 91177358, 91178927 and 91178953.

This 31st day of October, 2007.

Respectfully submitted,

KING & SPALDING LLP

A handwritten signature in black ink, appearing to read 'B. Baber', is written over a horizontal line.

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Attorneys for Applicant  
THE COCA-COLA COMPANY



CERTIFICATE OF SERVICE


This is to certify that I have this day served the foregoing Memorandum of Law In Support Of Motion To Consolidate Proceedings upon Opposers in each of the above-captioned matters, by causing true and correct copies thereof to be deposited in the United States mail, postage prepaid, addressed to Opposers' counsel of record as follows:

Mr. Simon Klein  
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This 31st day of October, 2007.

  
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Bruce W. Baber